A **SENAI PENTING PROPERTIES SDN BHD**

v.

TRI-MASTER INDUSTRIES SDN BHD & ANOR

B HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED JC
[CIVIL SUIT NO: 22-639-1998]
4 JUNE 2006

C ***CIVIL PROCEDURE:*** *Striking out - Want of prosecution - Appeal against - Failure to set down action for trial between June 1999 and June 2004 - Delay of five years - Whether inordinate and inexcusable delay - Whether defendants prejudiced - Whether deputy registrar rightly exercised judicial discretion in striking out action - Whether there was miscarriage* D *of justice*

This was the plaintiff's appeal (encl. 39) against the decision of the deputy registrar allowing the first defendant's application (encl. 34) and the second defendant's application (encl. 30) to strike out E the plaintiff's action for want of prosecution. The facts were that the writ of summons and statement of claim were filed on 23 September 1998 and notice of appearance was filed on 12 November 1998. After that, the defendants' statement of defence was filed on 16 December 1998. The plaintiff filed the reply to the F defence on 1 January 1999. On 14 January 1999 the summons for directions was filed by the plaintiff. On 11 June 1999, the plaintiff filed its bundle of documents and a copy was served on the defendant's solicitors. Continuing with the sequence of events in this action, the deputy registrar issued a show cause notice on 28 G April 2004. On 8 June 2004, the plaintiff filed the bundle of pleadings after the issuance of the show cause notice. On 6 July 2004, the second defendant filed the application to strike out the plaintiff's action for want of prosecution and on 11 October 2004 the first defendant filed a similar application. Hence, this appeal.

H **Held (dismissing plaintiff's appeal with costs):**

(1) The plaintiff had failed to proceed and/or set down this action for trial since 19 June 1999 had also failed to file a notice requiring attendance to attend a pre trial case management. I The court has the power to dismiss an action for want of prosecution, not only where the plaintiff's default has been intentional and contumelious but also where there has been

inordinate and inexcusable delay on its lawyer's part giving rise to a substantial risk that a fair trial would not be possible or would cause serious prejudice to the defendants. (paras 7 & 8)

(2) Nothing at all was done by the plaintiff to set the case down for trial between June 1999 and June 2004, a period of five years. The onus to set the action for trial was squarely on the plaintiff's shoulders. Under the old O. 34 r. 3(1) of the Rules of the High Court 1980, the plaintiff must file a 'request for setting down action for trial' in the format of the old Form 63. The plaintiff had failed to comply with that obligation. The plaintiff could not use the default of the defendants in not filing the bundle of documents and the affidavit verifying the list of documents as an excuse for not setting this action for trial. It was pertinent to note that the new O. 34 came into force in September 2000 and the plaintiff ought to have filed a new Form 63, that was to say 'notice to attend pre-trial case management' by October 2000. (paras 9 & 10)

(3) The plaintiff had failed to comply with O. 3 r. 6 of the Rules of the High Court 1980 which makes it mandatory that a 'notice of intention to proceed' must be filed and served if the plaintiff wished to proceed with the action after a period of one year had elapsed since the last proceeding, which was in June 1999. (para 11)

(4) The five year delay on the part of the plaintiff to prosecute the action against the defendants was an inordinate and inexcusable delay. The plaintiff had failed to provide any acceptable explanation or give any reasonable excuse for the delay. Further, there was no negotiation for settlement between the parties concerned. In the circumstances, the plaintiff's delay had been intentional and contumelious. (para 12)

(5) The action by the plaintiff was on trespass and damages onto the plaintiff's land. The parties concerned would undoubtedly depend to a large extent on the oral testimonies of their respective witnesses. Thus, the delay caused by the plaintiff before proceeding with the prosecution of this matter had prejudiced the defendants. (para 13)

(6) The deputy registrar had rightly exercised his judicial discretion to strike out the action for want of prosecution. It had not been shown that the discretion of the registrar had been exercised on a wrong principle and should have been exercised in a contrary way or that there had been a miscarriage of justice. (para 17)

Case(s) referred to:

Damayanti Kantilal Doshi v. Jogarlal Kantilal Doshi [2001] 8 CLJ 218 HC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Perwira Habib Bank Malaysia Bhd v. Asquare Credit & Leasing Sdn Bhd & Ors [2004] 5 CLJ 404 HC ***(refd)***

Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v. Lee Boon Tin [1998] 4 CLJ 368 CA ***(refd)***

Vasudevan v. Damodaran & Anor [1981] CLJ 84; [1981] CLJ (Rep) 101 FC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 3 r. 6, O. 34 r. 3(1)

For the plaintiff - Meachery Jo-Anne (Muhamad Abd Kadir with him); M/s CF Wong & Co

For the 1st defendant - Nor Aishah Abdul Rahman; M/s Abd Raman Saad & Assoc

For the 2nd defendant - Gan Techiong; M/s Gan & Lim

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed JC:

[1] This was the plaintiff's appeal (encl. 39) against the decision of the learned deputy registrar given on 5 January 2005 allowing the 1st defendant's application (encl. 34) and the 2nd defendant's application (encl. 30) to strike out the plaintiff's action for want of prosecution.

[2] To put things in proper context, it is important to set out the factual background and the sequence of events relevant to this appeal. The writ of summons and statement of claim were filed on 23 September 1998. Notice of appearance was filed on 12 November 1998. After that the defendants' statement of defence was filed on 16 December 1998. The plaintiff filed the reply to the

defence on 1 January 1999. Next, on 14 January 1999 the summon for directions was filed by the plaintiff. The learned senior assistant registrar granted the summons for directions order on 11 May 1999 in the following terms:

a. That the plaintiff was required, within 30 days, to serve on the defendants a list of documents and to file an affidavit verifying the said list;

b. That the defendants were required, within 30 days, to serve on the plaintiff a list of documents and to file an affidavit verifying the said list;

c. That the trial of the action shall take 4 days and the number of witnesses is 3 for the plaintiff and 5 for the defendants;

d. The costs of this action to be costs in the cause.

[3] Later on, the plaintiff filed its bundle of documents on 11 June 1999 and a copy was served on the defendants' solicitors. The plaintiff also filed the affidavit verifying list of documents on 11 June 1999 and a copy was served on the defendants' solicitors.

[4] Continuing with the sequence of events in this action, the deputy registrar issued a show cause notice dated 28 April 2004 (encl. 26) as follows:

Tuan-tuan,

Per: Mahkamah Tinggi Johor Bahru
Guaman Sivil No. MT(4) GS-639-1998

Notis Untuk Tunjuk Sebab
(Notice To Show Cause)
Senai Penting Properties Sdn. Bhd.
Tri-Master Industries Sdn. Bhd.

Merujuk perkara yang tersebut di atas, sila maklum bahawa perkara ini telah ditetapkan untuk sebutan pada hari 20 Mei 2004 di hadapan Timbalan Pendaftar Dalam Kamar Mahkamah Tinggi No. (4) di Mahkamah Tinggi, Malaya Johor Bahru jam 9.00 pagi / 2.30 petang.

2. Tuan dikehendaki menunjukkan sebab mengapa kes ini tidak boleh dibatalkan kerana kegagalan tuan melengkapkan perkara ini untuk perbicaraan / atau untuk mengambil tindakan seterusnya. Sekiranya tuan tidak berminat untuk meneruskan perkara ini, tuan boleh memfailkan dokumen-dokumen yang perlu untuk

membatalkan kes tersebut.

Saya yang menurut perintah,

"BERKHIDMAT UNTUK NEGARA"

t.t
(KUNJU KRISNAN A/L CHATHU NAIR)
Timbalan Pendaftar
Mahkamah Tinggi
80000 Johor Bahru

Kepada: 1. Tetuan C.F. Wong & Co.
Peguambela & Peguamcara
N-47&48, 1st Floor
Jalan Raya, Batu 21
81000 Kulai
[Rf: WCF/Senai-Penting/14039/97/fr]

2. Tetuan Abdul Raman Saad & Associates
Peguambela & Peguamcara
Johor Bahru
[Rf: SGS/50718-2000/hmh]

[5] On the appointed date of the hearing of the notice on 20 May 2004, the learned registrar informed parties that a letter would be issued by the court fixing a date for parties to appear before the judge. That, however, never happened. In its place, on 6 July 2004 the 2nd defendant filed the application in encl. 30 to strike out the plaintiff's action for want of prosecution and on 11 October 2004 and the 1st defendant filed a similar application in encl. 34.

[6] Going back a little, the plaintiff filed the bundle of pleadings on 8 Jun 2004 and served a copy of the said bundle on the solicitors for the 1st and 2nd defendants *vide* letter dated 7 Jun 2004. It is germane to note that the filing of the bundle was done after the issuance of the show cause notice.

[7] From the sequence of events that I have narrated a moment ago, it is unmistakable that the plaintiff had failed to proceed and/or set down this action for trial since 10 Jun 1999. The plaintiff had also failed to file a notice requiring attendance to attend a pre trial case management.

[8] It is settled law that the court has the power to dismiss an

action for want of prosecution, not only where the plaintiff's default has been intentional and contumelious but also where there has been inordinate and inexcusable delay on its lawyer's part giving rise to a substantial risk that a fair trial would not be possible or would cause serious prejudice to the defendants. (See: *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor v. Lee Boon Tin* [1998] 4 CLJ 368)

[9] It is an undisputed fact that nothing at all was done by the plaintiff to set the case down for trial between June 1999 and June 2004, a period of five years. To my mind the onus to set the action for trial was squarely on the plaintiff's shoulders. Under the old O. 34 r. 3(1) of the Rules of the High Court 1980 (the 1980 Rules), the plaintiff must file a "Request For Setting Down Action For Trial" in the format of the old Form 63. The plaintiff had failed to comply with that obligation. In this regard, the plaintiff cannot use the default of the defendants in not filing the bundle of document and the affidavit verifying the list of documents as an excuse for not setting this action for trial. (See: *Perwira Habib Bank Malaysia Bhd v. Asquare Credit & Leasing Sdn Bhd & Ors* [2004] 5 CLJ 404).

[10] It is also pertinent to note that the new O. 34 came into force in September 2000. The plaintiff ought to have filed a new Form 63, that is to say, "Notice To Attend Pre-Trial Case Management" by October 2000.

[11] Moreover, the plaintiff had also failed to comply with O. 3 r. 6 of the 1980 Rules which makes it mandatory that a "Notice Of Intention To Proceed" must be filed and served if the plaintiff wished to proceed with the action after a period of 1 year had elapsed since the last proceeding, which was in June 1999. (See: *Damayanti Kantilal Doshi v. Jogarlal Kantilal Doshi* [2001] 8 CLJ 218.)

[12] Having regard to the circumstances in this matter, I considered five years delay on the part of the plaintiff to prosecute the action against the defendants as inordinate and inexcusable delay. I had read the affidavits in reply (encl. 32 and 37) filed by the plaintiff and in my view the plaintiff had failed to provide any acceptable explanation or give any reasonable excuse for the delay. Further on this point, there was no negotiation for settlement between the parties concerned. In the circumstances,

in my view, the plaintiff's delay had been intentional and contumelious.

[13] Now, the action by the plaintiff was on trespass and damages on to the plaintiff's land. In such an action the parties concerned would undoubtedly depend to a large extent on the oral testimonies of their respective witnesses. In this regard, the 1st defendant in its affidavit in support at para. 7 (encl. 34) affirmed on 6 October 2004 by Toh Siew Hwa, the financial controller averred that the delay caused by the plaintiff of five years before proceeding with the prosecution of this matter had prejudiced the defendant for the following grounds:

a) Most of the facts of the matter were no longer in the 1st defendant's key witnesses' memory.

b) Other witnesses of the 1st defendant had moved and there would be difficulty in locating them.

[14] The plaintiff at para. 9 in its affidavit in reply by Chai Chong Boy (encl. 37) affirmed on 7 December 2004 when replying to para. 7 of the 1st defendant's affidavit simply said:

> Merujuk kepada perenggan 7 afldavit sokongan tersebut, plaintif telah dinasihati oleh peguamcaranya dan saya sesungguhnya percaya bahawa masalah sebagaimana yang dibutirkan oleh defendan pertama adalah semata-matanya untuk mengelakkan liability.

[15] The plaintiff did not reply to the 1st defendant's averments or request for the witnesses to be named. What's more, the plaintiff in its affidavit had not denied or disputed the 1st defendant's averments. It is trite law that in evaluating affidavit evidence, where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted. (See: *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609). Evidently the plaintiff accepted the unavailability of those witnesses and that some of them may not be able to recall what had taken place.

[16] On the facts and circumstances in this action and for the reasons aforesaid, I was of the view that the plaintiff was guilty of such inordinate and inexcusable delay and that the defendants had been seriously prejudiced by the long lapse of time. If the plaintiff had taken the essential steps to set the case down for trial

in 1999, undeniably the court would have fixed the case for trial as early as possible.

[17] I was satisfied that the plaintiff's appeal in encl. 39 was without merit and unsustainable. To my mind, the learned deputy registrar had rightly exercised his judicial discretion to strike out the action for want of prosecution. It had not been shown to me that the discretion of the learned registrar had been exercised on a wrong principle and should have been exercised in a contrary way or that there had been a miscarriage of justice. (See: *Vasudevan v. Damodaran & Anor* [1981] CLJ 84; [1981] CLJ (Rep) 101).

[18] As a consequence, the plaintiff's appeal (encl. 39) was dismissed with costs.